

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

TERESA FANDREY,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
CANON MINIMUM CENTERS,

Respondent.

Hearing was held on September 1, 2000 before Administrative Law Judge Mary S. McClatchey. Respondent was represented by Assistant Attorney General Cristina Valencia. Complainant appeared and represented herself.

PRELIMINARY MATTERS

Respondent's witnesses were: Richard Owens, owner of J & J's Convenience Store, Frank B. Miller, Deputy Warden, Canyon Minimum Centers, Department of Corrections ("DOC"), and Donice Neal, Warden, Canyon Minimum Centers.

Complainant called Sandra Forsett, a former J & J employee and Complainant's mother, and she also testified on her own behalf.

Respondent's Exhibits 1 through 10 were admitted by stipulation.

Complainant introduced no exhibits.

A witness sequestration order was entered upon Respondent's request.

MATTER APPEALED

Complainant appeals the termination of her employment. For the reasons set forth below, Respondent's action is affirmed.

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
3. Whether Respondent's action was arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

1. Complainant, Teresa Fandrey, commenced employment with DOC in 1991 as a Correctional Officer I.
2. In June of 1997, Complainant was hired as a part-time clerk and cashier at J & J Convenience store ("J & J") in Florence, Colorado.
3. In June of 1997, J & J was purchased by Jim Vendetti and Richard Owens. At the time of her employment, Complainant had known Owens for over twenty-five years; they were family friends.
4. During the fall of 1997, Owens and Vendetti noticed that J & J was losing money, and they both had to make significant cash infusions into the business. At the time they bought the business, they had been assured it was netting approximately \$5,000 per month, although they did not review the financial books prior to making the purchase.
5. Owens and Vendetti spent most of their free time in the fall and winter of 1997 examining the books and records of J & J, attempting to locate where they were suffering losses. They were convinced that one of their employees was stealing from them. It was difficult for the owners to define the point of loss, because of numerous outdated systems that were in place when they bought the store, including a cash register that did not identify or "track" the type of item sold with sufficient detail. However, they did identify a general trend of decreased grocery sales and increased lottery sales. (Owens' \$25,000 investment in October 1997 was gone by January 1998).
6. In the fall of 1997, Owens examined the Colorado State Lottery ("Lottery") logs for the past few months. He discovered that Complainant had Lottery sales during her shifts of between \$500 and \$600; whereas all other employees had sales of approximately \$200. This disparity "stuck out like a sore thumb" to Owens and was not attributable to the shift Complainant worked. The disparity led Owens to conclude that perhaps Complainant

was somehow stealing from J & J via the Lottery.

7. Owens showed the Lottery information to Vendetti. They decided that they would install a video camera in the store in order to find out if their assumption was correct.
8. On the night of February 4, 1998, after the store closed, Owens and Vendetti installed a video surveillance camera above the cashier's station in J & J.
9. Owens and Vendetti videotaped Complainant's entire 2 - 10 p.m. shift on February 5, 1998.
10. Owens personally viewed the video of Complainant during her February 5, 1998 shift. He saw the following:
 - A. Complainant rang up grocery, cigarette, and other items primarily as Lottery sales. For instance, if customer A intended to purchase \$4.35 worth of groceries, Complainant rang it up as \$4.00 of Lottery tickets and \$.35 as groceries.
 - B. After Complainant incorrectly rung up the grocery items as Lottery sales, she took \$4.00 of Lottery tickets and scratched them herself.
 - C. In this way, Complainant utilized J & J's sales proceeds to purchase Lottery tickets for herself. J & J received just a small portion of the money customers paid for items purchased in the store.
 - D. Complainant often threw the scratched Lottery tickets in the wastebasket on the customers' side of the cashier stand, so that it would appear as though customers had bought and scratched the Lottery tickets.
 - E. As Complainant bought herself Lottery tickets with J & J's cash, she kept a running tally on a calculator at her workstation. She utilized this to assure that she had "balanced" the Lottery sales log at three intervals during her shift.
 - F. Complainant made this type of Lottery transaction over 100 times during her shift. She obtained hundreds of dollars worth of Lottery tickets with J & J's cash on February 5, 2000.
 - G. Complainant also went into the aisles of J & J and took gloves, a pairing knife, and a few grocery items for herself. She then took

them out of the store at the end of her shift without ringing them up, as was required of J & J employees.

- H. Complainant took a 12 x 12-inch box, filled it with groceries, and placed it in the back of the store. Later, a friend of Complainant unknown to Owens and Vendetti came in, and Complainant's daughter handed her the box. She took it out of the store without paying for any of the items. Complainant did not ring up any of the items on the cash register, as was required of J & J employees making personal purchases.
 - I. Complainant gave her daughter a package of cigarettes that neither she nor her daughter paid for.
- 11. By comparing the videotape and the cash register tape, Owens and Vendetti confirmed that Complainant had wrung up non-Lottery items as Lottery (they could not see exactly what cash register button she had pressed on the videotape). The register tape had time and amount on it, which could be directly compared to the videotape. They estimated that she had stolen approximately \$600.00 from J & J on February 5, 1998.
 - 12. After viewing the February 5 video, on February 6 Owens and Vendetti asked Complainant to come to Vendetti's house for a meeting. She came, alone. They confronted her at the meeting, and showed her the video. Complainant at first denied doing anything wrong until she saw the videotape. Then she said she didn't think she'd stolen that much, and admitted taking some Lottery tickets. They all agreed that restitution was the best way to handle the situation. Owens and Vendetti agreed to keep the matter away from the police, so that she could keep her DOC job, on the condition that Complainant sign a promissory note agreeing to pay them back.
 - 13. On February 12, 1998, Owens, Vendetti, and Fandrey met at a bank in Florence, and executed a promissory note under oath via notary public. In the note, Complainant agreed to repay Owens and Vendetti \$30,000, plus interest, via monthly payments of \$200 in the first year, \$300 in the second year, and \$456.22 in the third and following years.
 - 14. Complainant never made any payments to Owens or Vendetti. At hearing, Complainant admitted that at the time she signed the notarized promissory note, she intended not to pay Owens or Vendetti anything.
 - 15. After three months of receiving no payment from Complainant, Owens and Vendetti turned the matter over to the Florence police department.

16. Lt. Mike Ingle was assigned to investigate the theft. He spoke with and received affidavits from Owens and Vendetti, and viewed the videotape, concluding that there were 57 separate incidents of Complainant stealing J & J money to use to purchase Lottery tickets for herself. His offense report repeats the contents of Paragraph 10, above. Further, in his offense report, Lt. Ingle indicates that he interviewed Complainant by phone, and that she admitted she had "made mistakes" on February 5, 1998, but stated she had "made it right with Richard and Jim." He further indicated that he set up an interview time with her at his office, for which she did not appear.
17. On November 3, 1998, the Fremont County District Attorney's office filed felony theft charges against Complainant. She was arrested after not turning herself in for a three-week period.
18. Deputy Warden Frank Miller set a pre-disciplinary meeting with Complainant on November 13, 1998. Complainant gave Miller a typewritten letter denying her guilt, which he considered prior to making his decision. After that meeting, he placed Complainant on leave without pay, commencing November 1, 1998, pending the outcome of the felony prosecution.
19. On May 1, 2000, Complainant plead guilty to a Class 4 Felony, Theft in the amount of \$500 - \$15,000, under C.R.S. section 18-4-401. The plea agreement stated that if she paid restitution in the amount of \$6848 by a date certain, that guilty plea would be vacated and modified to a guilty plea to Class Two Misdemeanor Theft, \$100 - \$500. On May 5, 2000, a Modified Plea Agreement was entered under which the guilty plea was modified to the misdemeanor because Complainant had paid full restitution. She was sentenced to three months of probation, including 60 days of electronic home monitoring as a condition thereof.
20. On May 25, 2000, Canon Minimum Centers Warden Donice Neal sent Complainant a letter setting a pre-disciplinary meeting for June 8, 2000.
21. Prior to the meeting, Warden Neal reviewed the plea agreements, the DOC Inspector General's report, the police department's investigative file, and Complainant's personnel file.
22. The predisciplinary meeting took place on June 8, 2000. At the meeting, Neal asked Complainant for her side of the story. Complainant denied that she had committed the theft, stated she had plead guilty because waiting for the trial was traumatic to her and she wanted the situation over

with, and stated that she felt she had been set-up.

23. Neal spoke with the owners of the J & J convenience store prior to making her disciplinary decision. Vendetti, a former DOC employee, informed Neal he felt it would be damaging to DOC employee morale to retain a convicted thief, that it would be a "slap in the face" to current and former DOC employees, eroding the trust of the community. Neal had never had contact with Vendetti prior to this conversation.
24. Neal considered three different written pieces of evidence as demonstrating Complainant had admitted to the thefts. First, in the promissory note, Complainant stated under oath that she owed Owens and Vendetti \$30,000. Second, in the Affidavit of Officer Ingles, he stated that Complainant had admitted to him that she had "made mistakes" on February 5. Third, the plea agreement constituted an admission of guilt: she plead guilty to Class IV felony theft, then to misdemeanor theft.
25. Neal considered as an aggravating factor the fact that the theft was not an impulsive act, but a thought-out, planned, repeated pattern of stealing behavior.
26. Neal considered the totality of circumstances impacting Complainant's ability to work as a correctional officer. She believed that the inmates' and the community's level of trust in and the credibility of the Department would be damaged by retaining Complainant in her position.
27. Neal believed that since Complainant had falsified Lottery documents and cash register records at the convenience store in the course of stealing money from J & J, this impugned her credibility. Credibility is a critical component of a correctional officer's ("CO") role in the correctional setting, since CO's have an enormous amount of power. CO's fill out numerous legal documents as an integral part of their jobs, including incident reports written up on inmates for bad behavior. Such incident reports can form the basis of inmates losing "good time" credit, being placed in solitary confinement or a higher security area, and losing other privileges. If a prison guard is known to have poor credibility, the integrity of the internal prison system is seriously damaged. Further, there can be no public trust in the integrity of that system.
28. Neal was also concerned that rather than accept responsibility for the situation and deal with rectifying it, Complainant's denial of guilt indicted a failure to take the situation seriously. Her denial further impugned her credibility.

29. Neal concluded that Complainant had violated the DOC Staff Code of Conduct, AR 1450-1, which constitutes the ethical standard under which all DOC employees must perform. That code mandates that DOC employees not be involved in "conduct unbecoming", which is defined to include "any act or conduct either on or off duty, which impacts job performance, not specifically mentioned in Administrative Regulations which tends to bring the DOC into disrepute or reflects discredit upon the individual as a correctional staff." (AR 1450-1, Section III(B)). This AR also states, "Any action on or off duty on the part of DOC staff that jeopardizes the integrity or security of the Department, calls into question the staff's ability to perform effectively and efficiently in his or her position, or casts doubt upon the integrity of the staff is prohibited. Staff will exercise good judgment and sound discretion." Section IV (L).
30. Based on her consideration of all of the above, Neal elected to terminate Complainant's employment.
31. Complainant seeks reinstatement, back pay and benefits.

DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. *McPeak v. Colorado Department of Social Services*, 919 P.2d 942 (Colo. App. 1996).

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995).

Credibility

The testimony of Owens is given great weight. An old family friend of Complainant, once Owens learned that Complainant had betrayed his trust and had been stealing from him for months, he was willing to keep the matter quiet so that she could retain her standing in the small Florence community and her DOC job. This initial act of kindness illustrates how far he was willing to go to help Complainant. It was only after waiting three full months for Complainant to begin paying him back that Owens finally turned the matter over to the police. This pattern of giving Complainant great leniency demonstrates that Owens had no intention of "framing" Complainant or using her as a "scape goat" for his business losses at J & J, as Complainant has argued. He sought to hold her appropriately responsible for her actions, allowing her to pay him back over an extremely long period of time at a rate that would compound his financial hardship.

Complainant's testimony is given no weight. After meeting with Owens and Vendetti, she had six days to think about whether to sign the promissory note. Complainant was thirty-seven years old at the time, a mature adult. She was fully capable of calling an attorney for advice on how to proceed. Her willingness to sign the promissory note was driven by her knowledge of her own guilt, by the fact that her repeated thefts were on video tape, and by her desire to keep the matter quiet. Complainant's statement to Officer Ingle that she had "made mistakes" on February 5, and her guilty plea, are further evidence of her guilt in this matter, trumping her professions of innocence at hearing.

Complainant committed the acts for which she was disciplined.

Respondent has met its burden of demonstrating that Complainant committed the acts for which she was disciplined. While Complainant steadfastly denies that she engaged in theft, she admits that she was the person on the February 5 video tape. Complainant made much of the fact that Owens could not see which cash register key she rung up when he watched the video. However, two facts confirm his conclusions: first, he was able to compare each transaction on the video with the cash register tape showing each transaction. Second, after each customer left the store, Complainant issued herself Lottery tickets for which she had not paid. It defies logic to conclude that Complainant was entitled to all of the Lottery tickets she scratched on February 5, when she never once put money in the cash register entitling her to those tickets. Moreover, the police officer's report of his viewing of the video corroborates Owens' description of the video.

Complainant maintains that Owens and Vendetti have used her as a scape goat for losing money in their business, and that in fact they had no procedures in place to track the source of their losses to her. This argument fails, since the February 5 video provides irrefutable proof of her guilt. Further, the fact that Complainant agreed that \$30,000 was a reasonable figure for restitution in the promissory note demonstrates conclusively that she engaged in the theft over a prolonged period of time. While it is clear that J & J did not have the best accounting and inventory tracking practices in place in 1997, the decrease in grocery revenue and the increase in Lottery "sales" fit Complainant's pattern of theft perfectly.

The Appointing Authority's Action was Within the Range of Reasonable Alternatives and was not Arbitrary, Capricious, or Contrary to Rule or Law.

The appointing authority investigated the matter thoroughly and without bias. The appointing authority honestly, fairly and candidly accounted for all of the factors appearing in R-6-6, 4 Code Colo. Reg. 801, which provides:

The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered.

The appointing authority correctly concluded that Complainant had committed an egregious violation of the DOC employee Code of Conduct by committing the ongoing pattern of theft. DOC AR 1450-1 provides, "Any action on or off duty on the part of DOC staff that jeopardizes the integrity or security of the Department, calls into question the staff's ability to perform effectively and efficiently in his or her position, or casts doubt upon the integrity of the staff is prohibited. Staff will exercise good judgment and sound discretion." Section IV (L).

Complainant committed repeated criminal acts of stealing cash proceeds and grocery and other items from J & J over a period of months. Her criminal acts were not a one-time, impulsive mistake in judgment; they were planned out well in advance. Complainant's actions are such that they not only cast doubt on her integrity, they destroy her integrity. A prison guard in a prison facility has the role of police officer. If the prisoners and the public cannot trust the police officers that enforce prison rules and regulations, then the integrity of the entire system is nullified. Thus, to allow one criminal to act as a police officer compromises the integrity of all police officers.

Complainant argues that the thefts had no impact on her job performance. However, as the discussion above demonstrates, the thefts have destroyed her credibility and integrity, two crucial components of the correctional officer position. This argument is rejected.

There was no agency abuse of discretion in this case. The appointing authority properly administered complainant's dismissal pursuant to R-6-9, 4 Code Colo. Reg. 801.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she was disciplined;
2. The discipline imposed was within the range of available alternatives;
3. Respondent's action was not arbitrary, capricious or contrary to rule or law.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of
October, 2000, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, Colorado 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of October, 2000, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Teresa Fandrey
P.O. Box 370
Florence, CO 81226

and in the interagency mail, addressed as follows:

Cristina Valencia
Assistant Attorney General
Personnel and Employment Law Section
1525 Sherman Street, Fifth Floor
Denver, CO 80203
